NG WENG SUM

v.

LEMBAH BERINGIN SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[ORIGINATING SUMMONS NO: S6-24-1507-2001]
21 SEPTEMBER 2002

LAND LAW: *Housing developers - Sale and purchase agreement - Defendant failed to complete and deliver vacant possession within stipulated time - Whether time was of essence of contract - Whether plaintiff entitled to terminate agreement - Whether defendant had established a good defence - Whether defendant had applied for extension of time*

This was the plaintiff's application for a declaration that the plaintiff's termination of a sale and purchase agreement ('the said agreement') between the plaintiff and the defendant in respect of the purchase of a lot with a two-storey shop/office ('the said property') was lawful and effective. The plaintiff had terminated the said agreement due to the defendant's failure to deliver vacant possession of the said property to the plaintiff upon completion of the 36-month period stipulated in the said agreement. Furthermore, cl. 5 of the said agreement stipulated that time was of the essence of the contract in relation to all provisions of the said agreement. The defendant admitted that there was a delay in delivering vacant possession of the said property but alleged that the delay was caused by the economic downturn which had severely affected the defendant's cash flow position.

Held:

[1] It was clearly stipulated in the said agreement and indeed not disputed by the defendant that time was of the essence of the contract, and it must be assumed that when the defendant entered into a sale and purchase agreement with the purchasers including the plaintiff, it was financially capable of completing the works in the said project within the time stipulated. The plaintiff's allegation that there was an economic downturn by itself was not enough to establish a good defence as there was a failure to explain how it had affected the project. The defendant had also failed to state that the delay was something which was outside its control. Furthermore, if the project was to be delayed, it would be incumbent upon the defendant to obtain the Housing Development Department's permission for an extension of time to complete the said project by giving valid reasons for the cause

of delay. As there was neither any evidence that the defendant had applied for such an extension nor that the Housing Development Department had granted approval for an extension of time, the date of delivery of the said property remained as stipulated in the said agreement. (p 137 e-h)

[Application allowed.]

Case(s) referred to:
Xavier Kang Yoon Mook v. Insun Development Sdn Bhd [1995] 2 CLJ 471 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 56(1)

For the plaintiff - WW Wong; M/s Tee Wong & Teoh
For the defendant - Robin Lim; M/s Azhar & Wong

Reported by Suresh Nathan

JUDGMENT

Azmel Maamor J:
The principal prayer sought by the plaintiff in this case was for a declaration that the plaintiffs termination of the sale and purchase agreement between the plaintiff and the defendant dated 31 December 1996 in respect of the purchase of a lot with a two storey shop/office was lawful and effective.

The brief facts of the case are as follows. By an agreement dated 31 December 1996 the plaintiff agreed to purchase from the defendant a lot known as Lot No. 33, the Crescent-Sector 10-1, Lembah Beringin, situated in the Mukim of Sungai Gumut, District of Hulu Selangor, Selangor, on which a two storey shop/office was to be constructed by the defendant (the said property). The purchase price of the said property was RM381,888. Under cl. 16.1 of the said agreement it was provided that the defendant would deliver vacant possession of the said property to the plaintiff within a period of 36 months from the date of the said agreement. And cl. 5 stipulated that time shall be the essence of the contract in relation to all provisions of the agreement.

A sum of RM285,510.40 had been paid progressively by the plaintiff to the defendant in respect of purchase price. However the defendant failed to deliver vacant possession of the said property to the plaintiff upon completion of the 36 months period. In view of the defendant's failure to effect delivery of vacant possession of the said property the plaintiff, through his solicitors, issued a letter dated 27 November 2000 to the defendant giving notice terminating the said agreement. At the same time the plaintiff demanded from the defendant

refund of his monies paid to the defendant and also damages. By a letter dated 29 November 2000 the defendant disputed the right of plaintiff to terminate the said agreement and refused to comply with the demands of the plaintiff. However, the defendant admitted there was delay in giving delivery of vacant possession of the said property caused by the economic downturn, which had severely affected the defendant's cash flow position.

On 2 February 2001 the plaintiff, through his solicitors wrote another letter to the defendant indicating his acceptance in respect of the defendant's repudiation of the said agreement and treated the said agreement as terminated and at the same time demanded the refund of the sum of RM285,510.40 which was paid to the defendant as part of the purchase price. Since no response was made by the defendant the plaintiff decided to commence this action against the defendant.

The main issue that this court is required to determine in this case is whether the termination of the said agreement by plaintiff was valid and lawfully effective.

The plaintiff argued that cl. 5 of the said agreement stipulates that time was of the essence of the contract. It was the defendant's promise to deliver vacant possession of the said property within the period of 36 months from the time of the signing of the said agreement. Because the defendant failed to deliver vacant possession on the expiry of the 36 months' period the plaintiff invoked s. 56 of the Contracts Act 1950 terminating the said agreement. Under the said agreement the plaintiff was given option either to terminate the agreement if the defendant failed to deliver vacant possession or to wait till a later date and then claim liquidated damages for late delivery from the defendant. In support of his argument the plaintiff relied on the case of *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] 2 CLJ 471. In that case the learned judge ruled that in the absence of any provision in the sale and purchase agreement for the purchaser to terminate the agreement on a breach committed by the Vendor, the purchaser can invoke s. 56(1) of the Contracts Act 1950 which states:

> Where a party promises to do a certain thing at or before a specific time, or certain things at or before specific times, and fails to do such thing at or before the specific time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

The learned judge in the *Xavier Kang Yoon Mook* case *(supra)* further said:

> As time was provided to be the essence of the agreement, the stipulated time period within which the house had to be delivered to the purchaser became

an essential condition of the agreement. As the developer was in breach of this condition, the purchaser was entitled to elect to rescind the agreement and sue for damages by virtue of ss. 56(1) and 65 of the Contracts Act 1950 or to treat the Agreement as continuing and sue for damages. The purchaser in this case had rightly exercised his former option. He was entitled to terminate the agreement, obtain the refund of the money he had paid and post-rescissionary damages as envisaged under s. 76 of the Contracts Act 1950.

In reply the defendant argued that the cause for the delay in delivering vacant possession was due to the prevailing economic downturn in 1998 which had adversely affected its cash flow position. The defendant promised to deliver vacant possession when the economy has recovered.

In addition the defendant contended that time was no longer of the essence because the defendant had already informed the plaintiff regarding the new date of delivery of vacant possession. The defendant invoked cl. 26 of the said agreement (force majuere clause) which allows the defendant the extension of time to deliver vacant possession of the said property.

After having considered the arguments from both counsels I arrived at the conclusion that the plaintiffs application be granted. It was clearly stipulated in the said agreement and indeed not disputed by the defendant that time was of the essence of the contract. The allegation that there was economic downturn by itself was not enough to establish a good defence to the plaintiff's claim. It must be assumed that when the defendant decided to commence the work on the said project and entered into sale and purchase agreement with purchasers including the plaintiff, the defendant was financially capable of completing the works in the said project within the time stipulated. In its letter dated 29 November 2000 the defendant failed to state clearly how the economic downturn affected the project other than stating that it affected its cash flow position. In what manner and by what reason it was not stated. The defendant also failed to state that delay was something which was outside its control.

Furthermore if the project was to be delayed it would be incumbent upon the defendant to obtain the Housing Development Department's permission for extension of time to complete the said project giving valid reasons for the cause of delay. No evidence of such extension had been applied by the defendant and no approval for extension of time was given by the housing development department. As such the date of delivery of the said property remained as stipulated in the said agreement.

In the light of the whole circumstances of this case and for the reasons as I have stated above I made the following rulings:

1. The termination of the sale and purchase agreement between the plaintiff and the defendant dated 31 December 1986 by the plaintiff's letter dated 27 November 2000 was lawful and effective.

2. The defendant was ordered to refund as sum of RM285,510.40 paid by the plaintiff to the defendant as part payment of the purchase price with interest at the rate of 8% p.a. from the date of termination to the date of realisation.

3. The plaintiff's claim for liquidated damages was however rejected.

4. I also ordered costs of this action be paid by the defendant to the plaintiff.